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No. 80-901

IN THE

Supreme Court of the United States

October Term, 1980

RAYMOND DONOVAN, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR

Appellant,

v.

DOUGLAS DEWEY AND
WAUKESHA LIME AND STONE COMPANY

Appellees.

On Appeal from the United States District Court for the Eastern District of Wisconsin

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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INDEX

	Page
MOTION:	
Interest of the AFL-CIO	i
Issue To Be Covered in the Brief Amicus Curiae	ii
Conclusion	ii
BRIEF:	
Introduction and Summary of Argument	1
Argument	5
I. Scope of Employer Resistance to Safety and Health Inspections	5
II. The Administrative Probable Cause Issue	10
A. General Schedule Inspections	13
B. Complaint Inspections	16
III. The Ex Parte Warrant Issue	21
Conclusion	25

TABLE OF AUTHORITIES

CASES:	
Babcock & Wilcox Co. v. *Marshall*, 610 F.2d 1128 (C.A. 3)	7
BP Oil, Inc. v. *Marshall*, E.D. Pa. No. 80-2031 (Feb. 18, 1981)	9
Burkart Randall Div. of Textron, Inc. v. *Marshall*, 625 F.2d 1313 (C.A. 7)	7, 17
Camara v. *Municipal Court*, 387 U.S. 523	11, 12
Cerro Metal Products v. *Marshall*, 620 F.2d 964	22, 24
Franks v. *Delaware*, 438 U.S. 154	7
In the Matter of C F & I Steel Corp., 489 F.Supp. 1302	

Page

In the Matter of Establishment Inspection of Federal Clearing Die Casting Co., 484 F. Supp. 215, (N.D. Ill.) 8, 19

In the Matter of Establishment Inspection of Gilbert & Bennett Manufacturing Co., 589 4.2d 1335 (C.A. 7) 16, 17

In the Matter of Establishment Inspection of Mason Co., 7 OSCH (BNA) 1557 (W.D. Ind.) 3

In the Matter of Establishment Inspection of Northwest Airlines, Inc. 587 F.2d 15 (C.A. 7) 14

In the Matter of Establishment Inspection of Wisconsin Steel, No. 79 C4284 (N.D. Ill. 12/28/79) .. 3

Marshall v. *Barlow's Inc.*, 436 U.S. 307 ..... passim

Marshall v. *Berwick Force & Fabricating Co.*, 474 F.Supp. 104 (N.D. Pa.) 8

Marshall v. *Chromalloy*, 589 F.2d 1335 (C.A. 7) 13, 14, 16

Marshall v. *Milwaukee Boiler Mfg. Co., Inc.*, 626 F.2d 1339 (C.A. 7) 7

Marshall v. *Nolichuckey Sand Co.*, 606 F.2d 693 (C.A. 6) 2

Marshall v. *Pool Offshore Co.*, 467 F.Supp. 978 (W.D. La. 1979) 8, 19

Marshall v. *Stoudt's Ferry Preparation Co.*, 602 F.2d 589 (C.A. 3) 2, 21, 22

Marshall v. *Texoline Co.*, 612 F.2d 935 (C.A. 5) 2

Marshall v. *Trinity Industries*, 7 OSCH (BNA) 1851 (W.D. Okla.) 3

Marshall v. *Weyerhaeuser Co.*, 456 F.Supp. 474 (D. N.J.) 11, 15

Marshall v. *W&W Steel Co.*, 604 F.2d 1322 (C.A. 10) 24

Matter of Urick Property, 472 F.Supp. 1193 (W.D. Pa.) 9, 15

Page

Michigan v. *Tyler*, 436 U.S. 499 ..... 17, 18

Pelton Casteel, Inc. v. *Marshall*, 588 F.2d 1182 (C.A. 7) 7, 19

Plum Creek Lumber Co. v. *Hutton*, 608 F.2d 1283 (C.A. 9) 7

See v. *City of Seattle*, 387 U.S. 541 11

Stoddard Lumber Co. v. *Marshall*, 627 F.2d 984 (C.A. 9) 15, 24

West Point Pepperell, Inc. v. *Marshall*, 496 F.Supp. 1178 (N.D. Ga.) 4, 8, 19-20

Weyerhaeuser Co. v. *Marshall*, 592 F.2d 373 (C.A. 7) 11

MISCELLANEOUS:

G. Schein & J. Runft, When OSHA Knocks at Your Door, Advice for You and Your Attorney (American Conservation Union, 1979) 6

STATUTES AND REGULATIONS:

Mine Safety and Health Act 30 U.S.C. § 813(a) 1, 22

Mine Safety and Health Act, 30 U.S.C. and § 813 (g)1 12

Mine Safety and Health Act, 30 U.S.C. § 818(a)(1) 22

Occupational Safety and Health Act ..... passim

45 Fed. Reg. 65916 (Oct. 3, 1980), amending 29 C.F.R. 1903.4 ..... 8, 9, 23

Labor Department Docket No. W-001 Ex. 3 ..... 2, 5, 8, 9

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS TO FILE A BRIEF AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the position of the appellant in this case.

INTEREST OF THE AFL-CIO

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 104 national and international labor organizations representing approximately 13,500,000 employees throughout

the United States. These statutes are the primary safeguards for worker health and safety, and the government's ability to make prompt inspections without prior warning is essential to their effective enforcement. For that reason the Federation filed a brief *amicus curiae* in *Barlow's* and seeks to present its views to the Court in this case.

ISSUE TO BE COVERED IN THE BRIEF AMICUS CURIAE

Barlow's was decided upon the understanding that "requiring warrants to inspect will [not] impose serious burdens on the inspection system or the courts, will [not] prevent inspections necessary to enforce the statute, [and] will [not] make [such inspections] less effective." 436 U.S. at 314.

Almost three years have passed since *Barlow's* was decided. In that relatively short period of time, at least 12 federal district court cases and 21 federal court of appeals cases deciding various issues regarding OSHA inspections have appeared in the principal federal reporters. Further, OSHA has been collecting, at least since October, 1978, detailed statistics upon refusals of entry and upon the means to obtain entry.

This "evidence", of course, was necessarily developed under OSHA rather than MSHA. While there are significant differences between the two Acts, these differences would appear to have no relationship either to the likelihood of employer resistance or to the types of issues to be raised as justification for resisting inspection. We devote our brief to detailing significant "evidence" of the possible effect upon the enforcement process of a warrant requirement now available, and to drawing the lessons that emerge from that evidence.

CONCLUSION

For the above stated reasons this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

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UNITED STATES DEPARTMENT OF LABOR

Appellant,

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the AFL-CIO in this case is set forth in that motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents with regard to inspections under § 103(a) of the Mine Safety and Health Act ("MSHA"), 30 U.S.C. § 813(a), a question parallel to that decided in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, concerning Occupational Safety and Health Act ("OSHA") inspections: whether, when consent is withheld, a warrant is required by the Fourth Amendment.

The Government argues, and several Courts of Appeals have agreed,[1] that this case is distinguishable from *Barlow's*, where the Court held that a warrant is required, both because the relevant statute is restricted to a single, particularly hazardous industry, and because the statute itself provides, to an extent greater than OSHA, sufficient assurance that "the occurrence and frequency of inspections are not left entirely to the unfettered discretion of inspectors in the field" (Jurisdictional Statement ("Juris. St.") at 15), thus obviating the need for individualized warrants to provide that assurance. We agree with this argument and do not here repeat the Government's demonstration. Rather, we address in this brief a pertinent line of inquiry not thus far discussed by the parties to this case.

Barlow's was decided upon the understanding that "requiring warrants to inspect will [not] impose serious burdens on the inspection system or the courts, will [not] prevent inspections necessary to enforce the statute, [and] will [not] make [such inspections] less effective." 436 U.S. at 314. The Court recognized, however, that the *Barlow's* "holding itself might have an impact on whether owners choose to resist requested searches," but determined to "await the development of evidence not present on this record to determine how serious an impediment to effective enforcement this might be." *Id.* at 316 n. 11.

Almost three years have passed since *Barlow's* was decided. In that relatively short period of time, at least 33 federal district court and federal court of appeals cases deciding various issues regarding OSHA inspec-

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[1] *Marshall* v. *Texoline Co.*, 612 F.2d 935 (C.A.5); *Marshall* v. *Nolichuckey Sand Co.*, 606 F.2d 693 (C.A. 6); *Marshall* v. *Stoudt's Ferry Preparation Co.*, 602 F.2d 589 (C.A. 3).

tions have appeared in the principal federal reporters. Many more similar cases have been litigated in federal district court but not officially reported. See, e.g., *In The Matter of Establishment Inspection of Mason Co.*, 7 OSHC (BNA) 1557 (W.D. Ind.); *Marshall* v. *Trinity Industries*, 7 OSHC (BNA) 1851 (W.D. Okla.); *In The Matter of Establishment Inspection of Wisconsin Steel*, No. 79 C4284 (N.D. Ill. 12/28/79). State reporters as well are beginning to be filled with cases in which employers have resisted OSHA inspections and raised before courts a large array of contentions supporting their resistance.[2] Further, OSHA has been collecting, at least since October, 1978, detailed statistics upon refusals of entry and upon the means taken to obtain entry. When, for reasons to be later explained, OSHA found it necessary to propose and then to promulgate a rule regarding its authority to obtain *ex parte* warrants rather than instituting full-blown adversary proceedings if inspection was resisted, OSHA spread upon the public record in the rulemaking proceeding both summaries of these statistics and anecdotal material gathered from regional offices of the Solicitor of Labor regarding some aspects of their post-*Barlow's* experience. *See* 45 Fed. Reg. 65916 (October 3, 1980); Record, Docket No. W-001, Exhibit 3 (hereafter cited simply "Exhibit ——".

This "evidence," of course, was necessarily developed under OSHA rather than MSHA. While there are, as previously mentioned (p. 2, *supra*), significant differ-

[2] OSHA provides for state enforcement of health and safety standards if certain conditions are met. 29 U.S.C. § 661. Twenty-one states currently have approved state plans. In those states, litigation concerning inspection resistance would ordinarily be in state court. Because of the sheer volume of cases which have been generated by *Barlow's* in less than three years—157 cases were found by shepardizing *Barlow's*, of which 65 were state court cases —we have limited our present inquiry to federal court cases.

ences between the two Acts, these differences would appear to have no relationship either to the likelihood of employer resistance to inspections or to the types of issues to be raised as justification for such resistance. We devote this brief to detailing significant "evidence" of the possible effect upon the enforcement process of a warrant requirement now available.

The overall lesson that emerges from that survey is that whether or not a warrant requirement will impede effective enforcement of OSHA, MSHA, or any other health and safety protection program depends upon the details of that requirement, both procedural and substantive.

Before presenting any of the legal materials, we believe some general observations regarding the scope of the resistance to inspection and the zeal with which some employers are determined to exploit every latent legal ambiguity by demanding interminable hearings may be of aid in evaluating the likely effect of a warrant requirement upon the safety and health inspection enforcement effort. We therefore briefly discuss this background in Part I, *infra*.

We then show in Part II, *infra*, that because *Barlow's* did not define "[t]he quantum of probable cause necessary for issuance of an administrative warrant . . . with precision" (*West Point Pepperell, Inc.* v. *Marshall*, 496 F. Supp. 1178 (N.D. Ga.), massive, and in many instances purely dilatory litigation has ensued on that question. This is itself disruptive of enforcement efforts, and too frequently has resulted in a level of judicial scrutiny of inspection decisions which severely hampers an effective inspection system, and which, we submit, this Court did not mandate in *Barlow's*.

In Part III, *infra*, we demonstrate that *Barlow's* has

given rise as well to employer procedural claims—including, most prominently, a claimed right to adversary rather than *ex parte* warrant proceedings—which have in fact led to substantial enforcement problems, and which, as this case is now structured, may well arise again under MSHA.

There is an obvious connection between these substantive and procedural problems: If the quantum of probable cause the Court meant to require in *Barlow's* is, as we believe, minimal, then it would be feasible for the enforcing agency to obtain "*ex parte* warrants in advance [of an inspection attempt]." *Barlow's, supra,* 436 U.S. at 316. If, on the other hand, the substantive showing is to be such that, as the Solicitor of Labor's Office has reported "[i]t is not unusual for an attorney to spend one to three days in the preparation of warrant documents" (Ex. 3-7), establishing effective safety inspection will prove to be impossible.

ARGUMENT

I

Scope of Employer Resistance to Safety and Health Inspections

While recognizing that the decision itself could alter the situation, the Court in *Marshall* v. *Barlow's Inc.,* 436 U.S. 307, 316 n. 11, observed that "[t]he great majority of businessmen can be expected in normal course to consent to inspection without warrant," noting that "the Secretary has not brought to this Court's attention any widespread pattern of refusal." In one sense, this observation remains valid under OSHA: a large majority of inspection attempts continue to go forward on a consensual basis, with the refusal remaining rather small on a *percentage* basis—on the order of two to three percent.[3] In absolute terms, how-

[3] *See* Ex. 3-18.

ever, the number of refusals of entry to federal inspectors is quite high: about 1400 refusals annually.[4] Further, the bulk of the refusals are in relatively large establishments of over fifty employees, and not in smaller establishments of the type which might involve more traditional privacy concerns. That the inspection-resisting firms are substantial enterprises is reflected in the resources they can apparently call upon to finance legal maneuvers manifestly designed only to forestall inspection.[5] Among the legal contentions litigated to the appeals court level *after Barlow's* have been:

> —whether "§ 8(a) of [OSHA] [is] unconstitutional to the extent that it allowed warrants to be granted ex parte and . . . without probable cause." *Babcock &*

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[4] Once again (*see* p. 3, n.2, *supra*), it is important to recognize that this number does *not* include state plan states, and therefore understates the magnitude of the problem.

[5] There has been no lack of organized encouragement to employers to resist inspection. *See, e.g.*, G. Schein & J. Runft, *When OSHA Knocks At Your Door, Advice For You and Your Attorney* (American Conservative Union, 1979).

The information provided by these sources to employers, while well-calculated to encourage resistance to inspections, is not noteworthy for its accuracy. For example, the Schein & Runft pamphlet tells employers that:

> "If the inspector has come to you simply on a 'random fishing expedition' (there has been no accident, illness, death or complaint from your employees) it would be virtually impossible to justify to the magistrate the issuance of a warrant. . . . The key point to remember is that the magistrate must be given some factual basis for concluding that a violation exists at the time that warrant is requested." [*Id.* at 3, 7.]

Compare the section of the same pamphlet entitled "Advice for Your Attorney" ("probable cause for an administrative warrant need not be based on specific evidence of an existing violation.") *Id.* at 12.

Wilcox Co. v. *Marshall*, 610 F.2d 1128, 1132 (C.A. 3): *compare Franks* v. *Delaware*, 438 U.S. 154, 169 (criminal warrant proceedings are ordinarily held *ex parte* to preserve element of surprise.)

—whether despite "the statement in *Barlow's* that "[p]robable cause in the criminal sense is not required" (436 U.S. at 320), "in the employee complaint situation, . . . traditional criminal probable cause should be required to justify issuance of a warrant." *Burkart Randall Div. of Textron, Inc.* v. *Marshall*, 625 F.2d 1313, 1317 (C.A. 7).

—whether despite the absence of any "indication in the Act . . . [forbidding] . . . an inspection . . . on the basis of an informal employee complaint" (*id.* at 1321), a "warrant is invalid because it is based upon employee complaints which are not in writing." *Id.*

—whether a warrant was invalid because "OSHA internal procedures require that the Area Director [rather than a safety supervisor] make the selection for inspection," where there was an agency regulation defining "Area Director" to include "any . . . person . . . authorized to act for such . . . officer." *Marshall* v. *Milwaukee Boiler Mfg. Co., Inc.*, 626 F.2d 1339, 1347 (C.A. 7).

—whether an inspection warrant was invalid because the warrant application referred to prior findings of "serious health hazards" in the plant, with a resulting need to ensure abatement, but the prior violations found were not "serious" violations within the meaning of 29 U.S.C. § 666(j). *Pelton Casteel, Inc.* v. *Marshall*, 588 F.2d 1182, 1187 (C.A. 7).

—whether "no nonconsensual administrative searches are possible under [OSHA]" and whether "the lesser showing of probable cause standard for administrative searches is unconstitutional." *Plum Creek Lumber Co.* v. *Hutton*, 608 F.2d 1283, 1287 (C.A. 9).

As is to be expected, the same dogged persistence has been exhibited by employers seeking to avoid inspection at the trial court level. Often, employers refused to submit to inspection when a warrant *was* presented. *See*, e.g., *West Point-Pepperell, Inc.* v. *Marshall*, 496 F.Supp. 1178, 1180 (N.D. Ga.); *Marshall* v. *Pool Offshore Co.*, 467 F. Supp. 978 (W.D. La. 1979); *Marshall* v. *Berwick Force & Fabricating Co.*, 474 F.Supp. 104 (N.D. Pa.). As one court commented in holding an employer who disobeyed a warrant in civil contempt, the arguments advanced to justify such refusal "may have been calculated to—at least in part—both obscure the relevant issues and mislead the court as to the law and standards to be applied." *In the Matter of Establishment Inspection of Federal Clearing Die Casting Co.*, 484 F.Supp. 215, 217 (N.D. Ill.).

The practical effects of this concerted strategy of resistance have been several. First, the participating employers have succeeded in forestalling entirely a substantial percentage of attempted inspections.[6] Second, where warrants were issued, the need to resort to warrants resulted in an *average* delay of thirty-six days from the date of denial of entry to the date of inspection. Ex. 3-18, p. 3. Where the employers successfully insisted upon adversary proceedings (see Part III, *infra*), the delays were considerably longer,[7] due at least in part to hearings lasting

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[6] In the eighteen month period between October, 1978 and April, 1980, warrants were either denied or not sought in 32.1% of the instances in which entry was refused. 45 Fed. Reg. 65923 & Ex. 3-18 p. 2. Most of these failures to go forward were due to agency decisions not to commit resources to seeking the warrants. *Id.*

[7] The record substantiates the agency's experience that obtaining warrants after an adversary hearing delays the Secretary's entry

as long as five days. 45 Fed Reg. 65919; *BP Oil, Inc.* v. *Marshall,* E.D. Pa. No. 80-2031 (Feb. 18, 1981). Finally, energies which could otherwise be devoted to inspections were devoted to preparing the lengthy warrant applications demanded by some courts,[8] and to presenting such applications to the courts, often along with live testimony. Thus, the employers who have denied entry to OSHA inspectors have had a major adverse impact on the effective enforcement of the Act.

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onto an employer's worksite. Significant delays in obtaining warrants after adversary hearings have been experienced by various Regional Solicitor offices. The New York Regional Solicitor's Office reports that, of fifteen post-*Barlow's* adversary proceedings involving warrants, three cases took three months to resolve, one case took four months, three cases presently awaiting the court's decision have already taken four months, and one case that is awaiting the court's decision has already consumed eight months. Exhibit 3-6. The Dallas Regional Solicitor's Office reports that adversary hearings delay the inspection from ten to sixty days. Exhibit 3-7. The Philadelphia Regional Solicitor's Office lists one case in which a warrant was issued five months after an adversary hearing and one case in which no decision has been issued even though six months have elapsed since an adversary hearing was held. Exhibit 3-9.

[8] *See,* e.g., *Matter of Urick Property,* 472 F.Supp. 1193, 1195 (W.D. Pa.), which held *inadequate* to support a warrant a "voluminous" application containing:

> "A six page general statement, plus numerous appendices showing the administrative adoption of the N.E.P. (National Emphasis Program) and the F.I.P. (Foundry Inspection Program) the selection of 300 foundries for inspection nationwide, the assignment of one general inspection to the Erie area consisting of 17 Pennsylvania counties, as well as a history of prior citations of the Respondent's facility, two old and one current employee reports of violations in particular areas, and the fact that no general inspection of this facility had been made in the past year.

II

The Administrative Probable Cause Issue

1. Because "the Secretary . . . limited his submission . . . to the constitutionality of a warrantless search," (436 U.S. at 325 n. 23), the Court in *Barlow's* did not address with any particularity the question of the standards to govern the validity of warrants for the conduct of OSHA inspections. There are, however, at least three indications that the showing necessary to support a warrant was intended to be one which the Secretary could satisfy without seriously sapping the enforcement effort.

First, *Barlow's* expressly noted that "the Secretary's entitlement to inspect will *not* depend on his demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises" (436 U.S. at 320):

> "Probable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular [establishment]." *Camara* v. *Municipal Court*, 387 U.S., at 538, 87 S.Ct., at 1736. A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser division of the area, would protect an employer's Fourth Amendment rights." [436 U.S. at 320.]

Second, the two primary purposes the warrant was said

to serve are to curb the "almost unbridled discretion [of] executive and administrative officers, particularly those in the field, as to when to search and whom to search," and to "advise the owner of the scope and objects of the search." 436 U.S. at 323. These purposes, it would appear, can be met without voluminous warrant applications, adversary hearings, or proof of random selection adequate to satisfy a scientific journal. (But see *Marshall* v. *Weyerhaeuser Co.*, 456 F.Supp. 474, 482, n. 9 (D.N.J.) (concluding that chosing one of eleven companies in a high hazard industry simply because one or another had to be first and not because of any previous "dealing" with the company, is inadequate to support a warrant, suggesting instead, *inter alia*, the use of random number tables).)

Third, *Barlow's* expressly derived the requirement of an administrative warrant from *Camara* v. *Municipal Court*, 387 U.S. 523, and *See* v. *City of Seattle*, 387 U.S. 541. *See* 436 U.S. at 321-322, 324. Those cases characterized the "limitations on administrative action which we think are constitutionally required in the case of investigative entry upon commercial establishments" as "minimal", stressing that:

> "[t]he agency's particular demand for access will of course be measured • • • against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved." [*See, supra*, 387 U.S. at 545.]

Enunciating the application of this principle to the municipal building code enforcement at stake in *Camara*, the Court noted that:

> "Such standards • • • may be based upon the passage of time, the nature of the building • • • or the condition of the entire area, but they will not necessarily

> depend upon the condition of the particular dwelling." [387 U.S. at 538; *see also id.* at 538, quoting *Frank* v. *Maryland*, 359 U.S. 360, 372 (Douglas, J., dissenting) ("The passage of a certain period without inspection might of itself be sufficient . . . to justify a warrant."]

It would appear, for example, that *Camara* contemplated issuance of a warrant upon an affidavit stating that a decision had been made to conduct a code inspection of all apartment houses, and that the particular building to be searched is an apartment house. That the *Barlow's* majority in fact intended that a warrant application at the same general level of detail would suffice is confirmed by its "doubt that the consumption of enforcement energies in the obtaining of such warrants will exceed manageable proportions." 436 U.S. at 321.[9]

2. Like MSHA (30 U.S.C. § 813(a) and g(1)), OSHA contemplates both routine ("general schedule") inspections and "complaint" inspections triggered by employee reports of unsafe conditions. 29 U.S.C. § 657(a) and (f)(1). While the two categories of inspections have presented somewhat different problems to the lower courts in judging whether the *Barlow's* test for an administrative warrant was met, the developments in both areas have been characterized by employer demands for a level of proof in

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[9] Further confirmation is the suggestion (436 U.S. at 325 n.23) that "the order for inspection that was issued in this case [may have been] the functional equivalent of a warrant." That order was based on an application which only stated generally that the inspection was "part of an inspection program designed to assure compliance with the Act." *Id.* at 323 n.20. That the Court contemplated that such conclusory language might well be sufficient at least indicates that minute review of the details of OSHA's selection process by hundreds of federal magistrates was not intended.

the warrant application far beyond the demonstration we believe *Barlow's* intended. To be sure the few Courts of Appeals which have directly addressed the level of probable cause required have generally reached results we regard as consistent with *Barlow's*. But the trial courts have shown a considerably greater tendency to erect much more stringent standards, with the result that warrant applications have become a major undertaking.

A. *General Schedule Inspections.* Perhaps the leading case at the present time on the showing which must be made to justify a general schedule OSHA inspection, and one which we regard as consistent both with *Barlow's* and with a workable enforcement program, is *Marshall* v. *Chromalloy*, 589 F.2d 1335 (C.A. 7). The pertinent portions of the warrant applicant in that case read as follows:

> 2. The desired inspection is part of an inspection and investigation program designed to assure compliance with the Act in the foundry industry, and is authorized by section 8(a) of the Act.
>
> • • •
>
> 9. Proper entry pursuant to section 8(a)(1) for the aforesaid purposes was attempted by duly authorized compliance officers of the Occupational Safety and Health Administration, United States Department of Labor, on the 19th day of April, 1977, *in the course of a National-Local plan designed to achieve significant reduction in the high incidence of occupational injuries and illnesses found in the metal-working and foundry industry,* but the right of entry was denied by the employer, or an agent of the employer. [*Id.* at 1341, emphasis added.]

As the Court of Appeals noted in upholding this showing as sufficient, the "National-Local plan designed to reduce the 'high-incidence' of occupational injuries in the

'foundry industry' . . . can be viewed as the functional equivalent of *Camara's* 'nature of the [building]' standard." 589 F.2d at 1342.[10]

The objections of the employer in *Chromalloy* to this demonstration of probable cause are not dissimilar from those raised in other cases:

> paragraph 9 . . . does not prove the hazardous nature of either this foundry or the foundry industry. Further, it faults the application for not alleging that the "high' incidence of injuries is the result of violations of OSHA standards. . . . In effect *Chromalloy* asks this court to hold that the Secretary would have to show, every time he wants a warrant, a complete set of updated industry statistics, the validity of these statistics, the rationale for applying a particular index factor to the foundry industry, and the reason for inspecting foundries in lieu of another industry. . . . [589 F.2d at 1342.][10]

Recognizing that to impose such a requirement would "turn a simple warrant request into a full-blown hearing [and] . . . would be imposing on the Secretary an unwarranted 'consumption of enforcement energies' which would

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[10] The Seventh Circuit had earlier rejected as inadequate under *Barlow's* a warrant application which, as here pertinent, simply stated that "[t]he desired inspection is . . . part of an inspection and investigation program designed to assure compliance with the Act and authorized by section 8(a)." *In the Matter of Establishment Inspection of Northwest Airlines, Inc.* 587 F.2d 15, 16-17 (C.A.7). This application, which was made before *Barlow's* (587 F.2d at 17), and appears to have been identical in this respect to that in *Barlow's* itself (p. 12, n.9, *supra*), was distinguished in *Chromalloy*, appropriately in our view, as one which made it "impossible for the magistrate to form a conclusion of reasonableness" (587 F.2d at 1341). Paragraph 9 of the *Chromalloy* application, adding that the industry was a high-risk industry and that a national plan to curb injuries in that indusry had been established, was viewed as entirely sufficient to fill that gap.

'exceed manageable proportions' " 589 F.2d at 1342, the *Chromalloy* court refused to require more than the simple statement contained in paragraph 9.[11]

Other courts, however, even after *Chromalloy* was decided, have acceded to precisely the sort of demands rejected by the Seventh Circuit in that case. For example, in *Matter of Urick Property, supra,* the court agreed that the "voluminous" warrant application explicating the Foundry Inspection Program "has been admirable as far as it goes" (472 F.Supp. at 1195), but refused to issue the warrant because:

> [W]e can find no recital of a rational basis for the selection of the Urick Foundry in the 17 county area in this region. We are told in the Application that Urick has not had a general inspection in the last year but we are not told how many other foundries also fit in this category. We are told of one current and two older violation complaints, but we are not told whether these complaints dictated the choice of Urick Foundry." [*Id.* at 11935.] [12]

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[11] The *Chromalloy* approach has been followed by at least *Stoddard Lumber Co.* v. *Marshall,* 627 F.2d 984, 988 (C.A.9) (rejecting the contention that an establishment in an industry stated to have 1.8 times the national injury rate could require the Secretary in order to justify an inspection "to provide statistics on the company's accident and illness rate, as well as show the company's position on the worst-first list." *Id.*)

[12] See *Marshall* v. *Weyerhaeuser Co.,* 456 F.Supp. 474 (D. N.J.) (a warrant application stating that the establishment is in an industry with an "occupational injury industrial rate of 19.1, indicating a high hazard industry" (*id.* at 478), and also that there had been a "three year time span between inspections" (*id.*), is insufficient because, *inter alia,* "[t]here is no indication of *Weyerhaeuser's* ranking on the list and there is no explanation of the hazard rate which is the controlling factor with respect to rank. . . . There is no information . . . to support the assertions that the Secretary uses the mere passage of time as a standard for conducting inspections." *Id.* at 482.

If the Court in *Barlow's* intended, as we believe, a showing at only the level of detail approved in *Chromalloy*—and if lower courts soon come to so understand, and contentions of the sort raised in *Urick, supra,* and *Weyerhaeuser, supra,* are uniformly and summarily rejected—the capacity for determined employers to forestall inspections and thwart enforcement, outlined in Part I, *supra,* would be substantially eliminated, at least as regards general schedule inspections. If, on the other hand, the *Urick* approach were to prevail—and, indeed, until it is soundly laid to rest—the magnitude of the task of preparing warrant applications for general schedule inspections will preclude routinely obtaining warrants in advance of any inspection attempt, and will make even post-denial warrant proceedings a major diversion of limited enforcement resources.

B. *Complaint Inspections.* In this area, once again, the Seventh Circuit has taken the lead and has adopted an approach which is both consistent with *Barlow's* and, we would think, consistent with the needs of an effective enforcement program. In the companion case to *Chromalloy, supra,* the Seventh Circuit rejected the argument that, while "[p]robable cause in the criminal sense is not required" (*Barlow's, supra,* 436 U.S. at 320) with regard to routine inspections, criminal standards do apply where the basis for the inspection is "specific evidence of an existing violation." *In the Matter of Establishment Inspection of Gilbert & Bennett Manufacturing Co.,* 589 F.2d 1335, 1339 (C.A. 7).[13] As a consequence, that court rejected the contentions that:

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[13] The relevant portions of the warrant application in *Gilbert & Bennett* read:

> 3. The desired inspection is also in response to an employee complaint that employees are required to climb on palletized

"the warrant application [must] set forth the underlying circumstances demonstrating the basis for the conclusions reached by the complainant, or that the underlying circumstances demonstrate a reason to believe that the complainant is a credible person. Nor is there a requirement that the application request be supplemented with a detailed, signed employee complaint." [*Id.* at 1339.]

One might have thought that this definitive holding would have laid to rest, at least in the Seventh Circuit, the question of the application of criminal probable cause standards to health and safety complaint inspections. However, in *Burkart Randall Division of Textron, Inc.* v. *Marshall, supra,* the issue was raised anew, with reliance upon *Michigan* v. *Tyler,* 436 U.S. 499, as supporting the contention. Noting that *Tyler* specifically *rejected* a similar contention and held instead that "entries to investigate the cause of the fire must be made pursuant to the warrant procedures *governing administrative searches*" (436 U.S.

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stock (wire products), which is handled by forklift trucks. Further, the employee complaint alleges that the employer would "climb" (stack) stock as high as necessary. Both items represent potential violations of section 5(a)(1) of the Act which requires employers to furnish to each of his employees employment and a place of employment which are 'free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees' in that, if conditions are as alleged at said employer's plant, employees may be in danger of injury by falling from palletized stock or hit by wire that has been rendered unsafe by stocking it to great heights, among others.

4. There have been four prior inspections of this employer's workplace, each resulting in OSHA compliance officers response to employee complaints, in each case the responding OSHA compliance officer(s) have found and cited the employer for alleged violations of the Act as a result of their inspections. [589 F.2d at 1339.]

at 155, emphasis supplied),[14] the court of appeals adhered to *Gilbert & Bennett* and rejected, *inter alia*, the arguments that the warrant must fail because the employee complaints were not under oath and the application "does not state that the particular compliance officer applying for the warrant personally received the employee complaints or had personal knowledge of the circumstances surrounding

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[14] *Tyler* does contain some elucidation upon the application of the administrative probable cause concept to searches "not programmatic but . . . responsive to individual events." *Id.* at 507. While at least one court has read that passage as possibly sanctioning a full-blown inquiry into the basis for the employee complaint (*In the Matter of C F &I Steel Corp.*, 489 F. Supp. 1302, 1307), that portion of *Tyler*, if applicable at all, would appear instead simply to require—as did the Seventh Circuit in *Weyerhauser Co.* v. *Marshall*, 592 F.2d 373 (C.A. 7)—that a warrant application in a complaint case adds a "few additional facts" to the general statement that "the Secretary had received a written complaint . . . and had determined that there were reasonable grounds to believe that a violation of the Act existed." *Id.* at 378. A statement of what the complaint pertained to, or attachment of the complaint with identifying material excised (*see, e.g., West-Point Pepperell, Inc.* v. *Marshall, supra*, 496 F.Supp. at 1182), ought to suffice.

Further, it is not clear to us that the "individual events" analysis of *Tyler is* here applicable. In *Tyler*, the post-fire inspections were somewhat different in purpose from routine fire inspections, which are enforcement- and prevention-oriented, while post-fire inspections are primarily designed to gather information. As to health and safety complaint inspections, however, the primary purpose of the inspections are identical to those conducted with no knowledge at all of specific violations: to enforce applicable standards in order to *prevent* injuries. Thus, such complaint inspections are best viewed as simply one aspect of the enforcement plan which has been established, in part by specific legislation and in part by regulation. And the decision to concentrate inspection efforts in establishments where there is *some* specific evidence of violation is certainly as "reasonable" as relying on random number tables.

their receipt. . . . [citing] *Marshall* v. *Horn Seed Co.*, 7 OSHC (BNA) 1182 (W.D. Okla.)." 625 F.2d at 1317, 1318 & n. 8.

Once again, however, the understanding of *Barlow's* probable cause standard has not been uniform. For example, one court regarded as inadequate "specific evidence" to support a warrant application affidavits stating that "employees of [the employer] had been killed in the course of their work at these locations, and . . . a total of five employees had been killed on offshore drilling platforms or rigs operated by [the employer] in the preceding nine months." *Marshall* v. *Pool Offshore Co.*, 467 F.Supp. 978, 979 (W.D. La.). *Compare In the Matter of Establishment Inspection of Federal Clearing Die Casting Co., supra,* 484 F.Supp. at 216 (newspaper report that an employee had both hands severed while working on a press at employer's establishment is "specific evidence of an existing OSHA violation."); *Pelton Casteel, Inc., supra,* 588 F.2d at 1188 (fact that there had previously been violations of the Act due to respirable silica and that the employer had endeavored to abate the violations by moving its operations is sufficient to support an inspection to determine whether abatement occurred).

Another court was faced with a warrant application reciting that there had been a number of employee complaints and an employee petition claiming:

> [s]even specific violations of the respirator standards were claimed to be occurring at the mill, including that West Point-Pepperell had not taken steps to ensure proper respirator fit, had failed to evaluate individual employees' ability to wear respirators, had failed to adequately make medical investigations concerning

> employees' compaints about respirators, had failed to transfer workers unable to wear respirators to low dust areas without reducing their pay, had failed to inform its workers about such hazards of cotton dust exposure as byssinosis (a respiratory illness colloquially known as "brown lung" by textile workers), had failed to inform employees of pulmonary test results and other medical data, and had possibly failed to require certain employees to wear the type of mask required for the cotton dust levels they were exposed to. [*West Point-Pepperell, supra,* 496 F.Supp. at 1182.]

While purporting to recognize that even in a complaint situation criminal probable cause standards do not apply, the court proceeded to hold a lengthy hearing (which would not, of course, occur in a criminal case). And the court then concluded that there was no "administrative probable cause to believe that effective OSHA respirator standards were or are being violated" because:

> [t]he evidence revealed that West Point-Pepperell has instituted a comprehensive respirator program, including a medical program to evaluate employees' ability to wear respirators and to handle prysical and psychological complaints stemming from the required wearing of respirators. [footnote omitted] It was also apparent that the Lindale mill does not discriminate against employees who are unable to wear respirators and that it has tried to thoroughly educate its workers on the dangers of cotton dust. The employees' petition to the government indicated at least some familiarity with the disease of byssinosis. . . . Considerable evidence has been presented to the court that West Point-Pepperell is carrying out a plan for monitoring cotton dust levels in its Lindale mill with vertical elutriators, the same testing devices which OSHA seeks to use. The scheme is being conducted in conjunction with changes to plant layout which are expected to alter

dust levels in various areas of the mill. [*Id.* at 1183-1184.]

Thus, the court in *West Point-Pepperell* in effect held a trial upon whether there were in fact OSHA violations, thereby thwarting the legislative method of determining *by inspection* whether such violations are in fact occurring.

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It is possible, of course, that after several more years of extensive litigation, and several more years of relatively widespread employer denials of inspections, the federal courts of appeal, or this Court, will have announced uniform standards similar to those in *Chromalloy* and *Gilbert & Bennett,* and the tendency of employers to demand, and of some courts to require, a massive and enforcement-sapping warrant showing will thereupon cease. In this instance, however, the reciprocal relationship between the degree of burden a warrant entails and the need for any warrant at all, suggests that awaiting the ordinary processes of litigation will not do. Rather, the question whether the *Urick-Weyerhaeuser-Pool Offshore West Point-Pepperell* approach is consistent with *Barlow's* is integral to the decision in *this* case. For, if it is, then the weight in the balance of the governmental need for warrantless searches is greatly increased.

III

The Ex Parte *Warrant Issue*

In additionto its other arguments, the Government in this case, appears to distinguish *Barlow's* on the ground that MSHA "prohibits forcible entries and thus provides a mine operator with an opportunity to obtain immediate judicial review of any special privacy claim." Jurisdictional Statement ("Juris. St.") at 15. *See also Stoudt's*

Ferry Prep. Co., supra, 602 F.2d at 594; *Texoline Co., supra,* 612 F.2d at 937. This suggestion is inaccurate if intended as a statement of what MSHA *requires.*[15] As a statement of agency policy, we find it quite troublesome, for a similar statement of policy made in the *Barlow's* litigation has been the basis for precluding *ex parte* warrants and requiring lengthy adversary proceedings.

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[15] Unlike OSHA, MSHA *does* expressly authorize an action to enjoin refusals to permit inspections 30 U.S.C. § 818 (a)(1). But, nowhere in the statute—or, so far as we are aware, its legislative history—is there any intimation that resort to such court action is the exclusive means contemplated by Congress for enforcing the entry right granted by 30 U.S.C. § 813(a). Section 818(a), to be sure, does not so state; that section says only that the Secretary under that section "*may* institute a civil action for . . . a permanent or temporary injunction" if entry is refused (emphasis supplied). And, as the court below in this case pointed out, refusal of entry are a violation of the Act which can result in substantial civil monetary penalties. Juris. St. App. at 5a.

Further, any suggestion that the Act may *require* an adversary injunctive proceeding if entry is refused would appear to be inconsistent with the statute's command that for two of the four categories of inspections provided for by the Act, "no advance notice of an inspection shall be provided to any person." 30 U.S.C. § 813(a). That "the Secretary . . . may give advance notice of inspections" held for information gathering rather than enforcement purposes (*id.*) explains in part the role of § 818(a)(1). In addition, it may be appropriate in some instances to seek a permanent, long-term injunction against an employer mandating entry whenever inspection is sought rather than an injunction pertaining to a single inspection. But, any information that MSHA *requires* an adversary proceeding before entry for enforcement inspections may be compelled is one which, in our view, is without support in the statute. Finally, the section may have been included simply to assure that there is jurisdiction over an injunctive action if the Secretary in individual instances determines that such is preferable. *Compare Marshall* v. *Gibson's Products, Inc.,* 584 F.2d 668 (C.A. 5); *Marshall* v. *Shellcast Corp.,* 592 F.2d 1369 (C.A. 5) (no jurisdiction over injunctive suit to compel OSHA inspection.)

In *Barlow's*, the Secretary, in what was later termed a "litigation strategy" (*Cerro Metal Products* v. *Marshall*, 620 F.2d 964, 976 n. 32; *id.* at 984 (Seitz, J., dissenting), made quite a similar representation to the Court. The Department's practice in the event of refusals of entry, said the Secretary, was to institute a civil action in federal court seeking an order compelling entry. 436 U.S. at 318 n. 14.

The proceeding which actually occurred in *Barlow's* itself, in fact, seems identical to that which the Secretary claims to be contemplated by MSHA. In *Barlow's* the Secretary filed an "Application for Affirmative Order to Grant Entry and for an Order to Show Cause why such affirmative order should not issue." *Id.* at 318 n. 14. By issuing the order to show cause (*id.*) the District Court necessarily afforded the employer the right to appear. The *Barlow's* Court relied upon this representation as an indication that such a proceeding was not inconsistent with the effective enforcement of the Act, noting that "[i]f this safeguard endangers the efficient administration of OSHA, the Secretary should never have adopted it." 436 U.S. at 320.

The Secretary later recognized, however, that with regard to OSHA the resort to adversary process in the period immediately preceding *Barlow's*[16] had not been conducive to effective enforcement of the Act. *See* 45 Fed. Reg. 65916 (Oct. 3, 1980), amending 29 CFR 1903.4. The Secretary noted that "the structure and fundamental policies of the Act mandate that inspection warrants be

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[16] Earlier, the Secretary had in some instances sought "a warrant . . . before the inspection is attempted." *Barlow's* 436 U.S. at 318 n.13, quoting Dept. of Labor, OSHA Compliance Operations Manual V-7 (Jan. 1972).

obtained *ex parte* . . . [because of] the fundamental importance of unannounced inspections." 45 Fed. Reg. at 65918. Further, OSHA reported that adversary proceedings led to "[s]ignificant delays in obtaining warrants" (*id.* at 65919) [17] and, both because "the adversary hearing is likely to consume several days trial time" (*id.*) and because "OSHA personnel would be required to be present in order to testify" (*id.*) to a severe "drain [on] the agency's scarce enforcement resources." *Id.*

The Secretary's efforts to alter the mode of obtaining *ex parte* process to that prevalent in criminal proceedings were, however, met with the objection that the Secretary's own regulations contemplated adversary proceedings. *Marshall* v. *W&W Steel Co.*, 604 F.2d 1322 (C.A. 10); *Cerro Metal Products* v. *Marshall*, 620 F.2d 964 (C.A. 3); *Stoddard Lumber Co.* v. *Marshall*, 627 F.2d 984 (C.A. 9). One court of appeals agreed with this proposition (*Cerro Metal Products, supra*), viewing *Barlow's* as supporting this reading of the applicable regulations. The result was, predictably, that adversary process was widely demanded, at least until the recent promulgation of a revised version of 29 C.F.R. § 1903.4. 45 Fed. Reg. 65916. Given this background, this Court's decision in the present case should take directly into account the demonstrated need for warrants, if such there are to be, to be issued *ex parte*, whatever the Secretary may now be suggesting in order to avoid any warrant requirement whatever.

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[17] An extensive administrative record was compiled by OSHA concerning the proposed amendment. In particular, OSHA gathered from all regional offices of the "Solicitor of Labor information on experience with adversary proceedings both before and after *Barlow's*. *See* Ex. 3-1 et seq.

CONCLUSION

For the reasons stated above, the judgment below should be reversed. If, however, warrants are indeed deemed necessary under the Fourth Amendmnt, this Court should make clear that such warrants may consistently with MSHA be issued *ex parte* and upon a showing with a minimum of detail of the existence of an inspection plan covering the establishment or of a complaint or other indication of safety hazards which could violate the Act.

Respectfully submitted,

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